



The Eternal Bliss: Demurrage is Liquidated Damages for a Single Breach

AUTHOR / KEY CONTACT



Philippa Langton
Partner

✉ philippa.langton@LA-law.com
☎ 023 8082 7414

K Line Pte Limited v Priminds Shipping (HK) Co Limited ("The Eternal Bliss") [2021] EWCA Civ 1712

This landmark judgment has brought welcome clarity for the shipping industry in relation to an issue of real significance. On 18 November 2021, the Court of Appeal overturned the first instance decision and ruled in favour of the charterers, finding that demurrage is liquidated damages for all the consequences of a charterer's failure to load or unload within the agreed laytime.

Background

The case concerned a voyage charter on an amended Norgrain 1973 form for the carriage of soya beans from Tubarao, Brazil to Longkou, China aboard the "Eternal Bliss". After arrival in Longkou and tender of notice of readiness, as a result of port congestion she was kept at anchorage for 31 days and failed to discharge her cargo within the agreed laytime period. The cargo spoiled and the cargo interests subsequently issued a cargo claim against the owners, which was settled for USD 1.1 million.

The owners commenced arbitration against the charterers to claim damages in respect of the charterers' breach: namely, their failure to discharge the cargo on time. The owners claimed (i) demurrage at the contractual rate for the period of delay and (ii) damages in respect of the cargo claim.

The charterparty provided: "*Demurrage at loading and/or discharging ports, if incurred, to be declared by Owners upon vessel nomination but maximum USD 20,000 per day or pro rata...*".

This raised a question of law, which the parties agreed should be properly determined by the court under s.45 Arbitration Act 1996. Section 45 allows parties in an on-going arbitration to make an application to the court to determine a preliminary point of law and is commonly used where an important point of law which would be of general interest arises. The question for consideration in this case was this: in a case where delay has resulted in cargo damage, is demurrage the owners' exclusive remedy or are the owners entitled to recover, in addition to demurrage, damages for the charterers' breach in failing to discharge within the agreed laytime and/or an indemnity in respect of the consequences of complying with the charterers' orders?

The High Court found in favour of the owners, holding that cargo claim liabilities were a different type of loss to the detention of the vessel. The owners were therefore entitled to recover damages in addition to demurrage, without proving a separate breach.

Given the significance of the point to the industry, the charterers were granted permission to appeal. The Court of Appeal has now overturned the earlier decision, confirming that the owner is only entitled to demurrage as compensation for all liabilities flowing from the charterer's single breach.

Liquidated Damages

The charterers had contended that demurrage operates as a liquidated and exclusive remedy for all the consequences of their failure to complete cargo operations within the agreed laytime.

They made the point that demurrage is typically considered to be a form of liquidated damages and there is a general presumption that clauses liquidating damages are intended to cover all losses flowing from the breach. In support of this submission, they asserted that the intention of liquidated damages is to achieve certainty and avoid controversy, such as this.

The charterers argued that whilst the principle losses flowing from the charterers' breach (failure to load or discharge within the laytime period) would be the vessel's loss of employment, the law did not expressly state that these were the only losses liquidated by way of a demurrage clause.

One Breach or Two?

The charterers relied heavily on the decision in "*The Bonde*" [1991] 1 Lloyd's Rep 136, in which it was held that if unliquidated damages are to be recovered, it is necessary to prove a separate breach in order to claim damages for a further loss.

They asserted that they had only committed one breach of charter in failing to discharge the cargo within the laytime period. The fact that the cargo spoiled as a result of that breach did not trigger a separate and distinct breach of charter enabling the owners to claim damages as well.

At first instance, Mr Justice Baker had concluded that "*The Bonde*" had been wrongly decided and took the view that "a demurrage rate is an agreed quantification of the owner's loss of use of the ship to earn freight by further employment in respect of delay to the ship after the expiry of laytime, nothing more". He held that, because the owners' claim was for "a different kind of loss", they were entitled to recover the cargo claim as unliquidated damages falling outside the scope of the demurrage clause in addition to demurrage.

Court of Appeal: About Turn

Whilst Baker J had considered that “the preponderance of views evident in dicta” is that demurrage liquidates the loss of earnings resulting from delay, and nothing more, the Court of Appeal took the view that, if anything, the balance tips the other way. Unlike Baker J, the Court of Appeal preferred not to depart from the decision in “The Bonde”, which they noted had been relied on for some 30 years without “causing any dissatisfaction in the market”.

They, therefore, found in favour of the charterers and held that the charterers’ payment of demurrage covers all losses arising from their failure to discharge cargo within the laytime period and not merely some of them. The charterers were therefore not required to indemnify the owners in respect of the cargo claims and were only required to pay demurrage.

Implications

Despite there being a number of cases and textbooks which have touched on the above issues over the years, as the Court of Appeal acknowledged, they are inconclusive. This decision therefore now brings welcome certainty to a point that has been the source of debate for many years.

Whilst this judgment represents a win for charterers, charterers are not entirely off the hook as it is clear that it is open to owners to claim damages in addition to demurrage arising from delay if they can establish a separate breach of contract.

It should also be noted that it is open to parties to draft their contracts in such a way as to get around this principle if they so wish, for example, by expressly agreeing that a liquidated damages clause should cover all or only some of the losses flowing from a breach of contract.

If you would like to discuss this charterparty with one of our industry experts, please contact our [marine lawyers](#) by emailing online.enquiries@la-law.com